NO. 20728

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

See Vol. 3377

BERNARD KAPLAN; ALBERTO BERUMEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING OF APPELLANTS BERNARD KAPLAN AND ALBERTO BERUMEN

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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Pursuant to Rule Twenty-Three of the Rules of Court, United States Court of Appeals for the Ninth Circuit, Appellants Bernard Kaplan and Alberto Berumen submit this Petition for Rehearing predicated upon the following grounds:

1. In the opinion heretofore rendered by this Honorable Court with respect to the instant case, it was concluded that appellants were not denied effective assistance of counsel due to an inherent conflict of interest, or otherwise. Such conclusion was predicated primarily upon the fact that such a possible conflict of interest was not "factually disclosed, nor even suggested, by a careful reading of the record". Appellants submit that the following excerpts of record in this case clearly disclose both the fact of the

possible conflict of interest and the nature thereof. Mr. Beckler, appellants' attorney at trial, after advising the Court that "there is a definite conflict of interest between the two defendants Berumen and Kaplan" (Supp. Tr., p. IX, lines 1-2), and that he could not "honestly and in good conscience represent both defendants" (Supp. Tr., p. IX, lines 16-17), briefly explained the nature of the conflict to the Court. Mr. Beckler informed the Court as to the nature of the conflict in the following manner:

> "MR. BECKLER: Without getting involved in substance, your Honor, I might say that I was notified -- or, I made a call and found out that Mr. Kaplan was wanted by the authorities and brought him down to the Commissioner's office for a proper arraignment and receiving the complaint. I was with him at all times. Therefore, I was under the impression -- no statements in fact were made. I found out now that previous to this, quite some time ago, there were certain statements made. These statements, without going into the substance of them -- that I didn't learn about in interviewing and counseling the defendant or in preparation for trial. I was convinced that none were made.
>
> "I learned Saturday that certain ones were made that are extremely essential to the defense of Mr. Berumen." (Supp. Tr., p. XII, lines 1-14).

Such a conflict would necessarily continue to exist regardless as to whether the Court or a jury sat as the trier of fact. Accordingly, appellants request a reconsideration by this Court of said ground of

its opinion.

2. Appellants further submit that this Honorable Court, in rendering its decision herein, failed to give full consideration to the conduct of Mr. Beckler, appellants' trial attorney, following his disclosure to the District Court of the existence of a conflict in interest between Appellants. In this connection the records show that when the District Court would not grant a continuance in Appellants' trial until some time after April 19, 1965, Mr. Beckler, for his own convenience in the representation of another client, agreed to attempt to have new counsel for Appellant Kaplan ready and prepared for trial the afternoon of the day the case was originally scheduled for trial (Supp. Tr., p. XIV, line 16 - p. XV, line 10). It will be recalled that Mr. Beckler was at all times prepared to answer ready for Defendant Berumen (See Supp. Tr., p. VIII, lines 15-18). It will further be recalled that on the date set for trial, no other counsel was present to represent Defendant Kaplan, even though there had been no consent to a waiver of jury trial by the Court up to that time. Despite such conduct by Mr. Beckler, no inquiry was made by the Trial Court as to the nature of the existing conflict and the manner of its possible resolution due to a waiver of jury. Appellants request a Rehearing by this Honorable Court so that the Court may reconsider the duty of the Trial Judge in light of Mr. Beckler's conduct.

3. Appellants further submit that this Honorable Court's conclusion that the Trial Judge acted properly in reviewing certain "Jencks Act" statements of government agents was predicated upon

a misinterpretation of the facts as disclosed by the trial record. In this connection the record clearly discloses that the statements in question were presented by the U. S. Attorney to counsel for Appellants and their co-defendant at trial at the time Agent Tomsic was called to the stand (See R. T., p. 154, line 17 to p. 155, line 2). According to Mr. Balaban, the statements presented to counsel for the co-defendant at his request in advance of trial, were not "Jencks Act" statements of the government agent who was called to the stand, but rather were statements of "witnesses who had previously testified" (R. T. p. 154, lines 17-20). When after a recess of Court, counsel for the co-defendant first ascertained that the Trial Judge had a copy of the statements of government agents (See R. T. p. 159, line 17 to p. 160, line 4), said counsel questioned the right of the Court to examine such statements and stated, "I do not know whether under Jencks it was proper to give such reports to the trier of fact, your Honor" (R. T. p. 160, lines 21-25). Counsel for Appellants further inquired from the Court whether the Court had the right to read such statements (See R. T. p. 161, lines 11-16). The only thing which counsel for the co-defendant conceded as being "proper" was the delivery of the statements by the U. S. Attorney to him, not to the trier of fact.

The statements of Agent Tomsic were never offered into evidence for any purpose whatsoever including being offered in support of the government's opposition to the Motion to Suppress which was then before the Trial Court. Accordingly, they should not and could not have been properly examined by the trier of fact

without substantial prejudice arising to Appellants.

CONCLUSION

Appellants submit that for the above reasons a Rehearing should be granted in this case, and that the decision of this Honorable Court heretofore rendered in the instant Appeal be vacated.

Respectfully submitted,

ALEXANDER, INMAN & FINE

By: GARY GOLDMAN and

MAURICE C. INMAN, JR.

Attorneys for Appellants

CERTIFICATE

I certify that in connection with the preparation of this Petition for Rehearing that I have examined the appropriate Rules of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules. I further certify that the instant Petition is, in my opinion, well founded and not interposed for purposes of delay.

By /s/ Gary Goldman

GARY GOLDMAN